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Submitted by,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. .....

ALEX HOLLANDER,

Petitioner,

against

GEORGE HOLLANDER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

ALEX HOLLANDER, Petitioner,

against

GEORGE HOLLANDER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 17, 1963, which affirmed an order of the District Court for the Southern District of New York adjudicating petitioner in contempt of court and fining him therefor.

The Opinions Below

The appeal herein to the Court of Appeals was from an order of District Judge Dudley B. Bonsal, entered November 19, 1962, which adjudicated petitioner in contempt of court and imposed fines aggregating $4,379 for an allegedly deficient compliance with a November 3, 1961 judgment by Judge Dimock directing petitioner to account for stock transactions in 1945-7; and notice was given that

there were brought up for review also intermediate orders by Judge Bonsal and by District Judge Archie D. Dawson, dated April 23, 1962 and February 2, 1962, respectively.

The opinion of the Court of Appeals (as yet unreported) is appended hereto (at pp. 13-14, *infra*).

The final opinion of Judge Bonsal (unreported) is printed in petitioner's Appendix to the Court of Appeals (hereinafter referred to as the Appendix or as A) at pages 67a-69a). Nine copies of that Appendix are being submitted herewith.

Judge Bonsal's opinion and order of April 23, 1962 is at pages 39a-41a of the Appendix. The pertinent portions thereof are quoted at page 8, *infra*.

Judge Dawson's opinion (unreported) is at pages 28a-29a of the Appendix.

The pertinent portions of Judge Dimock's opinion and findings appear at pages 5a-11a of the Appendix and his judgment appears at pages 12a-13a of the Appendix.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

The judgment of the Court of Appeals was entered on June 17, 1963.

A timely petition for rehearing was filed on June 27, 1963. A copy thereof is appended at pages 16-17, *infra*. It was denied, without comment, on July 2, 1963. A copy of the order of denial is appended at page 15, *infra*.

Question Presented

Petitioner's appeal raised, and the decision of the Court of Appeals presents, the following question:

> Is due process to an alleged contemnor (charged with wilful disobedience of a mandate to account) denied, or substantially impaired—is the judicial process unfairly weighted against the accused—when a District Court, in referring the factual issues to a Special Master to hear and report thereon, directs, in advance of the hearing, that the costs of such hearing shall be borne by the accused?*

These costs, after the hearing, were fixed at $4,379—$1,000 counsel fee to plaintiff's attorney plus $379 disbursements and $3,000 to the Special Master (A 72a).

In this case, the Court of Appeals recognized that

> "The issue on the merits is whether the defendant [petitioner] made a bona fide effort to comply with the District Court's mandates. In such a situation [since the evidence was conflicting], demeanor has crucial importance. . . ."

The Special Master, who heard 856 pages of testimony and considered numerous exhibits, reported that he was satisfied—despite the testimony to the contrary by petitioner's attorney of record as well as petitioner—that peti-

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* This point was argued in the Court of Appeals at pages 22-4 of the brief presented to that court; a reproduction of that portion of the brief is appended hereto at pages 18-20. Because the Court's opinion passed it over in silence, it was the subject of the petition for reargument (reproduced at pp. 16-17, *infra*). Other points were raised on the appeals that the evidence as a matter of law was insufficient to warrant the adjudication; that the intermediate order of Judge Dawson was erroneous, as a matter of law, in requiring petitioner "to take a position" under oath on factual matters which petitioner averred it was impossible for him to supply in the absence of records which had gone astray in the fifteen years which had intervened between the transactions and the judgment to account. Since the Court of Appeals ruled that the proper disposition of this case depended upon the evaluation of the conflicting evidence bearing on *bona fides*, the sole point sought to be presented to this Court is the one that the impartiality of the trier of the facts—the Special Master—was seriously impaired by the advance directive that the accused shall bear the costs of the hearing—which here aggregated $4,379.

tioner had wilfully and intentionally imperfectly complied with the mandates to account. Judge Bonsal's adjudication and fines rested upon the acceptance of that report. The Court of Appeals affirmed on the ground that since the Special Master had the benefit and advantage of observing "demeanor," there was "no basis for setting aside the determination of two District Judges and the Special Master."*

The Constitutional Provision Involved

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . ." (Fifth Amendment)

The Pertinent Facts

The following is added as a statement of the setting in which the question here presented arose.

In this action which, solely on the ground of *diversity of citizenship*, had been commenced in 1956 in the United States District Court for the Southern District of New York, a lengthy trial before District Judge Dimock resulted in a judgment, entered November 3, 1961, in which the Court dismissed plaintiff's claim of partnership in the defendant's business, awarded judgment for $3,165 admittedly due for money loans and directed the petitioner to account to the plaintiff for stock transactions which the petitioner admitted he had made in 1945-7 for the joint account of the plaintiff and himself (A 1a, 12a-13a). That accounting was ordered because Judge Dimock was not satisfied that the evidence of the accountings between the parties to the latter part of 1947 constituted an account stated (A 10a-11a).

The judgment directed that

". . . the defendant Alex Hollander account to the plaintiff for his purchases, during the period from

* Neither of the "two District Judges" had the benefit of "demeanor." Only the Special Master was thus advantaged.

January 1, 1945 to and including 1947 of shares of stock for the joint and equal account of himself and the plaintiff, and the sale thereof, and the monies received from Alex Hollander for such transactions and payments made to him. . . ."

The petitioner prepared and filed an account (A 14a-27a). Therein he explained (A 14a) that in the over fourteen years which had elapsed since the last transaction many of his pertinent stock records had gone astray, since "having fully accounted to the plaintiff in 1946 and 1947, at which time balances were struck and satisfied" he "had no reason to take pains, and took no pains, to preserve the records". Among the records he was unable to locate, he swore was a memorandum book in which he had recorded and separated his transactions for the joint account of himself and plaintiff from his other stock transactions, and, since the transcripts of the brokerage accounts which had been procured from the brokers for the purposes of the trial included all of his transactions during that period without differentiation of those for the joint account from those which were not, he could do "no better than" treat, for the purpose of the accounting, all his transactions as having been for joint account (as plaintiff had contended they were).

Contending that petitioner's failure to segregate the transactions for the joint account from the whole of his transactions was a wilful disobedience of the judgment and claiming other defects in the account, plaintiff moved to have petitioner adjudged and fined for contempt of court (R. 903-929), even though at the trial plaintiff insisted that every stock transaction which petitioner had engaged in in and after 1943 was for the joint account of himself and the petitioner.

On that motion, District Judge Dawson, in a memorandum and decision dated February 2, 1962 (A 28a-29a), held that petitioner's account "fails to comply with the

judgment" because "It is not an account 'in the form of debtor and creditor'" and petitioner "does not indicate which of the transactions, in his opinion, were part of the joint account in which the plaintiff was interested or what was done with securities in such account". Judge Dawson proceeded to say that petitioner (A 29a)

> "must himself take a position as to which securities were in the joint account and which were not, and which monies are to be treated as in the joint account and which are not".

Because he felt that the account as filed was due to misunderstanding, Judge Dawson denied so much of the motion as sought to hold petitioner in contempt, but did so "without prejudice . . . to renewal of the motion in the event defendant again fails to comply with the order of the court" and directed petitioner to furnish "the full and detailed statement, sworn to by him, of his account, in the form of debtor and creditor' as directed by the order of Judge Dimock dated November 3, 1961" and warned that "further failure of defendant to comply precisely with this order may be punishable by contempt" (A 29a).

The account which thus was rejected, in fact—as subsequently was testified to before the Special Master by an accountant called by plaintiff—simply and intelligently supplied all the pertinent facts and figures of all of the petitioner's stock transactions in 1945-7 (A 44a-48a).

However, in view of the rejection thereof, petitioner filed a new account, recast "in the form of debtor and creditor," but basically unchanged in substance, because, in the continued absence of records, petitioner found it impossible, under oath, to "take a position as to which securities were for the joint account and which were not" (A 36a-38a).

The plaintiff then moved a second time to have petitioner adjudged in contempt, substantially on the same grounds as the first motion with the added ground that this time

petitioner had defied Judge Dawson's order as well as the original judgment.

That motion came before Judge Monsal. Affidavits by the petitioner's attorney and by the petitioner (A 30a-38a) fully explained the situation. They pointed out that the second account, like the first, contained all the data that petitioner could possibly furnish in the absence of his "basic original record" which "repeated and extensive searches have failed" to bring to light (A 37a-38a; see also paragraphs numbered 13-15, 17 at A 31a-33a). In those affidavits, plaintiff's specific criticisms of the account, other than the failure to segregate the joint transactions from the other transactions, were taken up and shown to be erroneous (34a-36a). Both the petitioner and his attorney swore that everything possible had been done, with the aid of certified public accountants "to comply with the spirit and the letter of the judgment and order in this case" (A 31a); that petitioner had "not spared either time or expense in his efforts to furnish the information" (A 31a; see also A 33a, 34a); that "the account has been made up as best it could be on the basis of the data on hand . . . Alex can do no better and no more" (A 37a); that petitioner had "done everything within [his] power to fully and completely and meticulously comply with the directions to account" (37a); that petitioner "was unable to set forth by dates and amounts, [his] payments to the plaintiff, since [his] records of that are missing" but since he knew "that the plaintiff and [he] had a settlement of accounts in 1947 and again in 1949, at which time the records were available and were inspected and [they] then squared [their] accounts", he credited himself "in the amended account, as [he] did in the original account, with having paid the plaintiff the $3,000 which he contributed plus one-half of the net profits" (A 38a); and that petitioner did "not know of anything more or different that [he] can do to comply with the judgment" having "accounted to the best of [his] ability, knowledge, information

and belief, with the aid of competent accountants and competent attorneys" (A 38a).

Finding, however, on the face of the account deficiencies in compliance, Judge Bonsal referred the matter to a Special Master to "hear testimony, receive reports, check vouchers" and report, and Judge Bonsal reserved decision "pending the report of the Special Master". However, Judge Bonsal directed (A 41a):

> "*All costs of the proceeding before the Special Master shall be paid by the defendant Alex Hollander. The amount of such costs shall be fixed by the Court.*" (Italics supplied.)

At the hearings which followed before the Special Master, petitioner's attorney of record as well as petitioner testified, in great detail, to the effort that had gone into the preparation of the accounts and the conscientiousness and good faith of the endeavor to account as fully, accurately and minutely as was possible in the circumstances. Petitioner repeated the testimony which had been given at the trial and the averments he had made in his affidavits that the original records had gone astray and exhaustive repeated searching had failed to produce them (R. 99-104, 256-268, 289-320) and there was added the attorney's testimony in respect thereto (R. pp. 755-63).

However, while the hearings were proceeding, petitioner at the end of May, 1962 moved his home from the two-story and basement and garage private dwelling he had occupied for over twenty years, and in the course of that moving, when it was necessary to get everything out from the remote nooks and corners, in examining numerous tied up cartons which had been stowed away, *petitioner found* at the bottom of a carton of engravings and books a bag containing original brokers' statements and cards in his handwriting, which upon study (including comparison with the brokers' transcripts and such of the checks as were

still extant) turned out to be an original record of purchases and sales in 1945-1946 in which the joint account transactions were separated from the others and which contained other pertinent data (A 58a-60a; R. 380-671, 764-810). The petitioner's recollection had been that he had recorded the transactions in a notebook; the cards had so completely gone out of his memory that even after discovering and studying them they did not return to his memory (R. 450-4, 508-9, 513-17). But there they were, yellowed with age, containing in his own handwriting a complete record of every purchase and sale which he had made for the joint account of the plaintiff and himself and containing also a partial record of his payments to the brokers for those transactions (A 59a-60a). The information on the cards as to dates of purchase and sale and prices coincided with that appearing in the brokers' statements, except for variances of several days accounted for by the usual lag between date of order and date of completion of execution.

The fortuitate finding of those cards put petitioner in the position of being able to file a new account confined to the stock transactions in which the plaintiff had an interest, and leave was asked for an opportunity to prepare and file a new and superseding account.

The Special Master reported against petitioner in a report which fills sixteen pages of the Appendix (A 49a-64a). Petitioner filed exceptions thereto and moved for a determination in petitioner's favor and for a reconsideration by Judge Bonsal of his direction in the order of reference that the costs of the hearing be paid by the petitioner (A 64a-66a).

Petitioner's exceptions were overruled, his motion was denied, he was adjudicated in contempt, fined an aggregate of $4,379 and $3,000 more if the new account he was directed to file did not comply with the judgment and orders and some additional instructions set forth in the order of adjudication (A 67a-73a).

Reasons for Granting the Prayed-For Writ

It is unnecessary to elaborate the proposition that our judicial traditions require that triers of fact shall be as free as humanly possible of subconscious as well as manifest prejudicial influence. Nor is it necessary to document the proposition that such a requirement inheres in the constitutional guaranty of "due process"; there is no "due process" in the absence of a fair trial and, patently, a trial is not fair where the trier of the facts is not free of influences insidious to disinterested objectivity.

It certainly offends notions of fair play and due process to impose, as a condition for affording an accused a hearing, that he pay the costs of such a hearing. Normally it is only a losing party who is required to pay costs. Had the Special Master reported that, on the basis of the evidence developed before him, he could not recommend an adjudication of contempt, the advance direction that the costs of the hearing be borne by the defendant (the present petitioner) would have appeared to have been unsupportable. It cannot be assumed that the Special Master's objectivity was not subconsciously impaired by the realization that, because of the advance direction that the costs of the hearing be borne by the defendant, a report of acquittal would be quite embarrassing to the Judge who had appointed him.

The same embarrassment confronted Judge Bonsal on petitioner's motion to reject the Special Master's report and to deny the contempt application. The granting of that motion would have placed the Judge in the position of either imposing upon one falsely accused the costs of the hearing which resulted in his acquittal or, in reversal of his order of reference, shifting, *ex post facto*, the bearing of the costs from the accused to the accuser. Neither alternative was delectable; and dilemma was avoidable by finding the accused guilty. Who, in such circumstances, would not be subconsciously influenced to decide against the accused?

We know of no precedent for such a tainting of the judicial process by an advance provision that the costs of a hearing, regardless of its outcome, shall be borne by the accused. Such an impairment to disinterested evaluation of conflicting evidence, it is submitted, should not be sanctioned or overlooked, even though wrought innocently. It is urged that a writ should be granted to correct and cleanse the process in this case and to make certain that there shall be no repetition, in any other case, for want of circumspection, of such unintentioned, yet insidious, impairment of due process.

The usual reluctance to upset a finding of fact should not obtain where there is an injection in the proceedings of a factor which, although unwittingly, operates against unimpaired objectivity of evaluation and of decision; on the contrary, it should be held that such a violation of due process invalidates the determination, without speculating as to whether, in fact, the determination would have been different in the absence of the error.

CONCLUSION

In sum, it is submitted that there has been here a serious (though unintended) violation of petitioner's constitutional right to due process and also a grave (though unwitting) departure from acceptable and proper course of judicial procedure which calls for the exercise of this Court's power of supervision and correction, and, accordingly, this petition for certiorari should be granted.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

August 20, 1963.

Decision of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 372—October Term, 1962

(Argued June 4, 1963 Decided June 17, 1963)

Docket No. 28017

GEORGE HOLLANDER,

Plaintiff-Appellee,

v.

ALEX HOLLANDER,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

CLARK, *Circuit Judge,* and BARTELS, *District Judge.*

Appeal from the United States District Court for the Southern District of New York, Dudley B. Bonsal, Judge.

Alex Hollander appeals from an order adjudging him in contempt of court. Affirmed.

COPAL MINTZ, New York City, *for defendant-appellant.*

MORRIS POTTISH, New York City, *for plaintiff-appellee.*

PER CURIAM:

In an action before Judge Dimock, defendant-appellant was found to have engaged in stock transactions for the

joint account of himself and his brother, plaintiff-appellee. Judge Dimock ordered an accounting. When it was submitted, plaintiff thought it inadequate and sought to have defendant held in contempt. Judge Dawson agreed that the accounting was inadequate, but felt that defendant should be given a second chance to comply. When the second accounting was presented, plaintiff again moved to have defendant adjudged in contempt. Judge Bonsal found that defendant still had not complied with Judge Dimocks' order and appointed Frank H. Gordon, Special Master, to conduct a hearing so as to obtain the accounting which defendant persisted in failing to make. The result of these proceedings was a recommendation that defendant be held in contempt. Judge Bonsal accepted the Special Master's recommendations, directed the defendant to pay $1,379 to plaintiff's attorney as reasonable compensation and disbursements, together with $3,000 to the Master as fee, and further directed a proper accounting or penalty of a $3,000 fine. Defendant now appeals from this judgment.

Plaintiff asks us to reopen the denial of his motion to dismiss the appeal, made by another panel of this court. This, however, we are unwilling to do. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U. S. 541, 545-547. The defendant must pay over large sums of money to plaintiff's attorney and the Special Master, and this order he cannot effectively appeal after the final judgment on the accountings. The issue on the merits is whether the defendant made a bona fide effort to comply with the district court's mandates. In such a situation, demeanor has crucial importance. Beyond that, defendant's conduct seems dubious and irresponsible. Thus there is no basis for setting aside the determinations of two district judges and the Special Master.

Affirmed.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

PETITION FOR REHEARING

Copal Mintz, New York, N. Y.
for Defendant-Appellant

Petition denied.

J. L. L.,
C. E. C.,
U. S. C. J.J.

J. R. B.,
U. S. D. J.

2 July, 1963.

Petition to Court of Appeals for Rehearing.

[SAME TITLE]

Defendant-appellant respectfully petitions the Court for a rehearing of the appeal herein decided June 17, 1963.

This petition proceeds from the belief that in affirming the orders appealed from the Court did not give sufficient consideration to the point—Point II (pp. 22-24) of appellant's main brief and Point I (pp. 1-3) of appellant's reply brief—that Judge Bonsal's direction, in advance of the reference ordered by him, that the costs of such reference shall be borne by appellant was a prejudicial prejudgment which infected the determination and report of the Special Master and thus the order appealed from.

In arriving at its affirmance, this Court said *per curiam:*

> "The issue on the merits is whether the defendant made a bona fide effort to comply with the district court's mandates. In such a situation, demeanor has crucial importance. . . . . Thus there is no basis for setting aside the determinations of two district judges and the Special Master."

The determination of Judge Dawson was on papers only. So was the last order of Judge Bonsal. Neither of them, therefore, *was better advantaged* than this Court to determine the issues (*Senato v. United States*, 173 F. 2d 493, 2d Circ. 1949; and cases cited therein).

Only the Special Master had the benefit of "demeanor". Thus it was the hearing before the Special Master which was of "crucial importance". Therefore, it was crucially important that the proceedings before him be free of any subconscious prejudicial influence.

It was in that crucial aspect that, appellant urges, the proceedings which resulted in the appealed from order were *improperly weighted against appellant* by the ad-

vance mandate that the costs of the hearing be borne by the defendant. There was such prejudicial weighting because the Special Master thereby was placed in the position of where his finding in favor of the appellant would have rendered that direction unsupportable. The same embarrassment also inhered in the subsequent consideration by Judge Bonsal of the Special Master's report.

The undersigned respectfully re-stresses that such improper influence of judgment (all the more so if subtle and subconscious)—that such impediment to impartial determination—is contrary to the interest of justice and is a denial of due process.

This Court's view that in a case such as this "demeanor has crucial importance", it is submitted, emphasizes the pivotal importance of the hearing and, hence, the crucial importance of any factor operative against unimpaired objectivity of evaluation and reporting.

The usual reluctance to upset a finding of fact should not obtain where the proceedings are not free of legal error and such error cannot confidently be held to have had no effect on the determination. It is respectfully urged that the costs directive here complained of constituted legal error which infected the result—or, at least, cannot confidently be said not to have infected the result—and that thus, as a matter of law, the appealed-from order should be reversed.

I hereby certify that this petition is submitted sincerely and in good faith and not for purposes of delay or any other ulterior end.

Respectfully submitted,

COPAL MINTZ,
Attorney for Defendant-Appellant.

June 25, 1963.

Portion of Petitioner's Brief (in Chief) to Court of Appeals.

II.

The direction in Judge Bonsal's order of reference that the costs of the reference shall be borne by appellant was a prejudicial pre-judgment.

If Judge Bonsal was convinced by the evidence before him that appellant had contumaciously disobeyed or failed to comply with the judgment and order of Judge Dawson, there was no purpose or reason for directing a hearing by a Special Master.

If a hearing was requisite, there was no basis for determining in advance that the defending party rather than the moving party should bear the cost of the reference. It is only a losing party who is required to pay costs. To impose upon a defendant an obligation to pay the cost of a hearing to determine his guilt is, we submit, a glaring denial of due process.

Had the Special Master reported that, on the basis of the evidence developed before him, he could not recommend an adjudication of contempt, the advance direction that the costs of the hearing be borne by the defendant would have appeared to have been unsupportable. It cannot be assumed that the Special Master's objectivity was not subconsciously impaired by the realization that a report of acquittal would be quite embarrassing to the judge who had appointed him because of the advance direction that the costs of the hearing be borne by the appellant.

The same embarrassment confronted Judge Bonsal on the appellant's motion to reject the Special Master's report and deny the contempt application. It would be incongruous to acquit the appellant and yet impose upon

him the costs of the hearing. An acquittal thus would have had to be accompanied by the elimination from the order of April 30th of the provision that the appellant bear the costs of the hearing and to impose them upon the plaintiff *ex post facto*. Such impediments to impartial determination on the basis of the evidence adduced at the hearing are contrary to the interests of justice.

The prejudicial character of such an advance imposition of costs is illustrated by the fact that, in his brief to Judge Bonsal after the Special Master's report, appellant's counsel was under the necessity of saying, in order to set forth his position:

> ". . . in advance of the ascertainment of whether or not defendant had been contumacious and thereby had damaged the plaintiff, the court should not have ordered that the costs of the reference be borne by the accused party. It is rather strange that a party should be accorded an opportunity to defend himself only upon condition that he pay the costs and expenses of the prosecution. With all due deference, we suggest that the court was without power to make a direction of that character and that, in any event, it was improvident. To the extent that the direction was based upon a pre-judgment of guilt, it was precipitous, and if now upon the full record of the hearing, the court comes to the conclusion that the accounts which the defendant filed were not contumacious, it is submitted that assessment against the defendant of the *costs of the hearing which resulted in the vindication* would be contrary to the usual course of judicial administration."

The impropriety of that direction appears from the "Civil Rules" which the District Court made effective

Portion of Petitioner's Brief (in Chief) to Court of Appeals.

July 1, 1962, a little over two months after the date of Judge Bonsal's memorandum, of April 23rd and order of April 30th, 1962. Rules 6(d) and 14 make it fairly clear the costs of a hearing before a Special Master may be chargeable to a defending or opposing party, without his consent, only when he is "the unsuccessful party". Rule 14(b) provides that an "alleged contemnor" who "puts in issue his alleged misconduct or the damages thereby occasioned" is "entitled to have oral evidence taken thereon, either before the court or before a master appointed by the court". One can hardly be said to be "entitled" to a hearing if he can get it only by agreeing to pay the Special Master's fees and the other costs of the hearing.

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Submitted by
MORRIS POTTISH

Supreme Court of the United States

October Term 1963

No. 391

ALEX HOLLANDER,

Petitioner,

against

GEORGE HOLLANDER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term 1963

No. 391

ALEX HOLLANDER,

Petitioner,

against

GEORGE HOLLANDER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition herein indicates (p. 2) that petitioner is submitting copies of his Appendix to the Court of Appeals. In the succeeding portions of this brief, a numeral followed by "a" refers to page number of said Appendix.

Facts

Petitioner's statement of facts is both inaccurate and inadequate but we believe it unnecessary to burden the Court at this time with a full exposition of such inaccuracies and inadequacies. We limit ourselves to an accurate statement of those facts which are directly pertinent to the question petitioner now presents.

After trial of an action for an accounting, District Judge Dimock held, "I find the defenses raised to be without merit" (9a); and by his judgment entered November 3, 1961 he directed the petitioner to account to the respondent (12a-13a).

Petitioner's original account was received January 15, 1962; respondent moved before District Judge Dawson

to punish for contempt for non-compliance with the judgment; and Judge Dawson, deciding to give petitioner another chance, denied the motion without prejudice on February 2, 1962, with a provision that "Any further failure of defendant to comply precisely with this order may be punished by contempt" (28a-29a).

Petitioner's first amended account was received on March 7, 1962. Respondent then moved before District Judge Bonsal for an order:

> 1. punishing petitioner for contempt for non-compliance with the prior directions of the court,
>
> 2. directing petitioner to serve a new account in compliance with the earlier directions of the court, and
>
> 3. granting such other relief as might be proper (70a).

On this motion Judge Bonsal made a memorandum decision on April 23, 1962 wherein he found, among other things:

> "Upon a thorough review of all the papers in this action, I find that the defendant has still not complied with Judge Dimock's order of November 3, 1961. For example, the account contains no adequate statement as to the amounts of capital contributed by the joint venturers. * * * Moreover, the item 'Payments to Plaintiff' ($3,683.82) is not broken down either by dates or specific amounts. There are doubtless many other deficiencies." (40a)

Based on said decision, and on April 30, 1962, Judge Bonsal ordered a reference to a Special Master to hear and report, and ordered that

> "the Special Master shall hear testimony, receive reports, check vouchers, and receive any other information which may be relevant to the making of a

> proper accounting by the defendant Alex Hollander in accordance with the instructions contained in or order herein made by Judge Edward J. Dimock dated and entered November 3, 1961." (43a)

In the same order, Judge Bonsal further directed (and this is the sole basis for the instant petition for a writ) that

> "all costs of the proceeding before the Special Master shall be paid by the defendant Alex Hollander, and that the amount of such costs shall be fixed by the Court." (43a)

Expensive hearings were had, with evidence offered by counsel for each party; and the Special Master in his report included recommendations for the preparation of a second amended account (63a-64a). Thereafter, by order made November 19, 1962, Judge Bonsal directed that petitioner file a second amended account in accordance with those recommendations (68a-69a). By said order, Judge Bonsal also adjudged petitioner in contempt and fined him the costs of the proceeding in amounts totalling $4,379, consisting of $1,000 to respondent's attorney as reasonable compensation for his services, plus $379 for his disbursements, plus $3,000 to the Special Master as reasonable compensation for his services (72a).

Appeal Proceedings Below

Petitioner appealed to the Court of Appeals. Respondent moved to dismiss the appeal (pet., p. 14). That motion was grounded on the proposition that the contempt order appealed from was not a "final" decision within the meaning of 18 U. S. Code, Section 1291, and hence there was no jurisdiction to entertain the appeal. In support of that contention, respondent cited *Fox v. Capital Co.*, 299 U. S. 105; *Doyle v. London Guarantee & A. Co.*, 204 U. S. 599; and *Hultberg v. Anderson*, 214 F. 349. The motion to dismiss was denied (pet., p. 14).

The appeal was then heard on the merits, and the Court of Appeals unanimously affirmed on June 17, 1963 (pet., pp. 13-14).

Petitioner then petitioned for rehearing, which the Court of Appeals unanimously denied on July 2, 1963 (pet., p. 15).

ARGUMENT

POINT I

Judge Bonsal's direction that petitioner pay costs did not constitute a denial of due process.

Petitioner claims (pet., pp. 3-4) that Judge Bonsal's direction that petitioner pay the costs of the proceeding before the Special Master constituted a deprivation of due process under the Fifth Amendment. Petitioner cites no authority for his position.

Petitioner makes no claim that he was deprived of notice or opportunity to be heard; and of course he participated fully in all the hearings and proceedings below. He argued in the Court of Appeals (see, pet., p. 18) that Judge Bonsal's direction constituted a "prejudicial pre-judgment." That argument was based on the premise that Judge Bonsal could not allocate costs until after he received the evidence to be developed at the hearing before the Special Master. We submit that such premise is invalid.

The respondent had moved for several forms of relief, including not only an adjudication of contempt, but also a direction to petitioner that he comply with the prior directions of the court (70a). On the basis of the motion papers submitted to Judge Bonsal (before any reference was had), he found that the petitioner had not complied with the prior directions of the court (40a), and directed that the Special Master hear and report as to information relevant

to the making of a proper accounting (43a). The Special Master subsequently made such recommendations (63a-64a), and Judge Bonsal then directed petitioner to file a second amended account in accordance with those recommendations (68a-69a).

We thus have a situation where the reference was made necessary because the petitioner had failed to comply with the prior judgment and order of the District Court. Who should pay the costs of such a reference if not the petitioner whose non-compliance had made it necessary?

It was not essential for Judge Bonsal to have the results of the Special Master's hearing in order to determine whether petitioner was or was not in compliance; the fact of non-compliance was evident from the papers, and Judge Bonsal explicitly so found (40a). This was not a "pre-judgment"; it was an actual and proper finding that the petitioner was not in compliance; and by the same token it was an actual and proper finding that the petitioner was unsuccessful in his contention that he was in compliance. Thus, not only was the petitioner the unsuccessful party (*cf.* Rule 54(d) of the Federal Rules of Civil Procedure), but the finding of non-compliance in this equity proceeding vested the Court with jurisdiction in its discretion to impose and allocate costs against the erring petitioner (*Kansas City Southern Ry. Co. v. Guardian Trust Co.*, 281 U. S. 9; *N.L.R.B. v. Brashear Freight Lines*, 127 F. 2d 198, 200; *Atwood v. Klebera*, 163 F. 2d 108, cer. den. 332 U. S. 843). As for the actual amount of costs awarded, this was not determined by Judge Bonsal until after he had the benefit of the Special Master's hearing and report (70a-73a).

Petitioner argues:

> "It certainly offends notions of fair play and due process to impose, *as a condition for affording an accused a hearing*, that he pay the costs of such a hearing." (Pet., p. 10; emphasis added.)

The difficulty with that argument is that it is contrary to the fact. Petitioner's opportunity to defend himself was not conditioned upon his payment of the costs. The question of amount of costs payable was explicitly reserved until after the hearing (43a); and indeed the petitioner has not paid any of the costs to respondent to this very date.

Petitioner further argues (pet., p. 10) that the advance direction for costs would so unconsciously impair the objectivity of the Special Master because a report of acquittal would be embarrassing to Judge Bonsal, and further that Judge Bonsal would be embarrassed if he acquitted the petitioner of contempt. We submit that said argument is absurd on its face, that it is offensive without warrant, and that it need not be dignified by further formal response.

POINT II.

Reasonable damages should be adjudged to respondent for the delay caused by petitioner.

The judgment directing petitioner to account to respondent was granted on November 3, 1961. The order giving petitioner a second chance to comply with the judgment was made on February 2, 1962. The finding that petitioner had again failed to comply was made on April 23, 1962. Extensive hearings had to be held; and then the order directing petitioner to file a new account was made on April 30, 1962, which order also adjudged petitioner in contempt. Petitioner appealed, and there was a unanimous affirmance on June 17, 1963. Petitioner then petitioned for a rehearing, which was unanimously denied on July 2, 1963. Now, almost two years after the judgment for an accounting, we have the instant petition for a writ which makes the entirely unwarranted charge of "tainting of the judicial process" (pet., p. 11) and in truth shows no ground

whatever for a writ (cf., Rule 19(1) of the Rules of the Supreme Court).

The mere chronological statement of the proceedings shows that petitioner's proceedings have caused considerable delay, to say nothing of harassment and expense, to the respondent. We submit that this is an appropriate case for this Court to "adjudge to the respondent reasonable damages for his delay", pursuant to Rule 56(4) of the Rules of the Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be denied. Reasonable damages should be adjudged to respondent for his delay.

Dated: August 26, 1963.

Respectfully submitted,

MORRIS POTTISH,
Attorney for Respondent.